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No. 95-49

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

JOEL OLIVERA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court should entertain this case when the issue raised by petitioner has not been presented by the Illinois Supreme Court's decision in this case?

2. Whether the petitioner has shown any reason for the Court to entertain this case involving only settled questions of federal law?

3. Whether the Supreme Court should review a decision by a state court of last resort that does not decide any federal question in a way that conflicts with the decisions of other courts?

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PEOPLE OF THE STATE OF ILLINOIS,

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). No issue has been raised with respect to jurisdiction.

STATEMENT OF THE CASE

Respondent Joel Olivera, along with Jorge Vargas, was charged in August of 1988 with the first degree murder of Raphael Torres on July 29, 1988. (C.L.R. 14-17) Prior to trial, Mr. Olivera filed a motion to suppress the oral and court-reported statements that he made during a

post-arrest custodial interrogation by the Chicago police. (C.L.R. 32-33) At the conclusion of a hearing on the motion to suppress, the trial judge determined that, although Olivera had unquestionably initially invoked his Fifth and Sixth Amendment rights, he later waived those rights by initiating a conversation with the police. (R. 207-08) The trial court accordingly denied Olivera's motion to suppress and permitted his statements to be introduced into evidence against him. (R. 204-08; S.R. 230-37)

Considerable evidence, mostly undisputed, was offered at the suppression hearing regarding the circumstances leading up to the inculpatory statements elicited from Olivera by the authorities. Olivera was arrested on the evening of August 9, 1988 for a matter completely unrelated to the July 29th Torres homicide, namely, the July 31st aggravated battery of Rafino Cortez. (C.L.R. 9; R. 38, 68-72, 77-82, 98-100, 144-46) Olivera was arrested when he voluntarily surrendered himself that day at the police station accompanied by his Spanish-speaking father, Gerado Olivera, and respondent's attorney, John DeLeon. (R. 36-37, 50, 68, 78, 178-96) Olivera was at that time a 16-year-old high school freshman (C.L.R. 9, 82; S.R. 32, 39, 63-64, 232, 236, 247) with no prior criminal history or experience with the police. (C.L.R. 64-70; R. 1138)

When Olivera arrived at the police station at approximately 6:00-7:00 p.m. with his father and his attorney, he was met there by Officer Darrell Gilliam. (R. 36-37, 50, 68, 78, 179-80) Officer Gilliam had previously been trying to locate Olivera as a suspect in the Cortez aggravated battery case. (R. 33-34, 67, 77) In an interview room at the police station, Officer Gilliam explained to Olivera that

because he was 16 years old, he could be charged as an adult for the aggravated battery of Cortez. (R. 38; S.R. 39) Officer Gilliam said nothing about any other case or investigation – *i.e.*, the Torres shooting – involving Olivera as a suspect. (R. 38, 82) Olivera stated to Officer Gilliam that he did not want to answer any questions, and Olivera's attorney also emphasized this point to Officer Gilliam. (R. 39, 69-70, 78-79, 181, 185, 190) Officer Gilliam responded that he understood Olivera did not wish to answer any questions other than those relating to background information and stated that Olivera's rights and wishes would be respected. (R. 40, 70, 79, 81)

With that assurance, Olivera's attorney left the police station, leaving Gerado Olivera behind with his son in the interview room at the station. (R. 40-41, 71) Prior to departing, however, the attorney requested that Officer Gilliam contact him if there were to be any lineups or questioning and left the officer a card containing his office and beeper telephone numbers. (R. 40, 54, 69, 71, 83, 182)

At approximately 8:30 p.m., Officer Gilliam took respondent and the paperwork upstairs to Detective Chris Kato. (S.R. 31-32; R. 71) Detective Kato and his partner, Detective Wayne Johnson, at that point took over the investigation of the Cortez aggravated battery. (R. 98, 144) Officer Gilliam informed Detective Kato that Olivera had surrendered himself with his attorney and had been placed under arrest and given his *Miranda* rights. (R. 89-91, 156-61) Officer Gilliam also told Kato that Olivera did not wish to make any statements to the police. (R. 92-93) Officer Gilliam did not give Detective Kato Mr.

DeLeon's card, or phone number, or beeper number, nor did Officer Gilliam inform Detective Kato that he had those numbers to give him. (R. 94) Officer Gilliam simply informed Detective Kato that if a positive identification of Olivera was made at any lineup, the police had to notify Olivera's lawyer. (R. 83-84, 146)

At approximately 10:00-11:00 that evening, a lineup was held at the police station in connection with the July 31st aggravated battery of Mr. Cortez; Olivera was identified in that lineup. (S.R. 47, R. 99, 145) Prior to that lineup, Olivera had made no statements to the police or engaged in any discussions with the police beyond providing Officer Gilliam with some routine background information for his aggravated battery arrest report. (R. 65-124, 143-76; S.R. 27-140) Thus, prior to the lineup that was held at approximately 11:00 p.m., it is undisputed that Olivera unequivocally exercised his constitutional rights to remain silent and to deal with the police exclusively through his retained counsel. (R. 37-41, 78-81, 91-92, 207-08)

Following the lineup, a series of inculpatory statements was elicited by the authorities. The first conversation between Olivera and the police, lasting approximately 15 minutes in length, was held shortly after the 11:00 p.m. lineup and involved Detectives Kato and Johnson. (R. 147-49) The subject matter of that conversation was the Cortez aggravated battery. The second conversation took place at approximately midnight and lasted approximately 15-20 minutes. (R. 151-52) This conversation was also only between Olivera and Detectives Kato and Johnson. (R. 152) After their initial conversation with Olivera about the Cortez incident, and after learning

of certain apparent similarities between the Cortez incident and the Torres homicide, Detectives Kato and Johnson advised Olivera of his *Miranda* rights and, for the first time, interrogated Olivera about the Torres homicide. (R. 167-68) The third conversation with Olivera took place at approximately 3:00-3:30 a.m., and involved Detective Kato, an Assistant State's Attorney and a youth officer. (R. 152-53) This conversation, dealing exclusively with the Torres homicide, also lasted approximately 15-20 minutes. (S.R. 216) Finally, at approximately 5:30 a.m., a 4-minute court-reported statement about the Torres homicide was taken from Olivera in the presence of the Assistant State's Attorney, Detective Kato and the youth officer. (R. 153-55; S.R. 221, 230-37; C. 82)

Olivera's father, who had been sitting downstairs in the police station all night long while these conversations were taking place, was never permitted to see his 16-year-old son or attend these conversations. (S.R. 40-41; R. 107-08, 183) Similarly, although the police and the Assistant State's Attorney were aware that Olivera was represented by an attorney in this matter, they made no attempt at any time to contact the attorney concerning the lineup or to obtain his consent to speak with his 16-year-old client before repeatedly interrogating Olivera for the purpose of eliciting inculpatory statements. (R. 31-65, 109-10, 160-61; S.R. 64, 243)

The factual focus of the instant Petition for a Writ of Certiorari ("Petition") concerns the events, immediately following the 11:00 lineup, which led to the inculpatory statements that were ultimately obtained from Olivera by the authorities. Detectives Kato and Johnson, the only police witnesses present for what occurred after the

lineup, offered dramatically different accounts of those post-lineup events. According to Detective Kato, after the interview room had been cleared by Kato following the lineup, Olivera stated to Detectives Kato and Johnson, "what happened?" (R. 147) Kato told Olivera that he had been positively identified in the lineup. Olivera stated that he wanted to know what happens next. The detective answered by advising Olivera of his rights. Thereafter, Olivera stated that he was not alone when he shot the victim. The police then engaged Olivera further in a 10 to 15 minute discussion about the Cortez incident. (R. 100, 149)

In contrast, Kato's own partner, Detective Johnson, testified repeatedly and unequivocally at the suppression hearing that the first conversation following the 11:00 p.m. lineup was initiated by the police, not Olivera (R. 114-16), and that it was only after Detective Kato first informed Olivera that he was picked out in the lineup that respondent then stated he was not alone. Detective Johnson further testified that no *Miranda* warnings at all were given to Olivera in connection with the conversation immediately following the lineup; indeed, according to Detective Johnson, it was not until the midnight conversation regarding a different incident, *i.e.*, the Torres murder, that such warnings were first given to Olivera. (R. 114-16)

The trial court held that although Olivera unequivocally invoked his Fifth Amendment right to counsel (R. 204, 207-08), and although he initially exercised his Constitutional right to remain silent, and "set forth that he did not wish to speak to the police" (R. 267), the court

held that Olivera later "waived his rights when he initiated the . . . conversation after the lineup with Detective Kato." (R. 268) Relying on *Arizona v. Roberson*, 486 U.S. 675 (1988), and *Edwards v. Arizona*, 451 U.S. 477 (1981), the trial court therefore denied Olivera's motion to suppress and the statements were permitted into evidence against Olivera.[1]

Olivera was subsequently convicted of the murder. Olivera appealed his conviction asserting, among other things, that the trial court had improperly denied his motion to suppress. The Illinois Appellate Court agreed and reversed the conviction holding that "the trial court's decision to deny the defendant's motion to suppress oral and court reported statements was against the manifest weight of the evidence in this case." *People v. Olivera*, 246 Ill. App. 3d 921, 939, 617 N.E.2d 98, 110 (1st Dist. 1993). The appellate court held that the totality of the circumstances surrounding Olivera's discussions with the Chicago police were different than the inquiries by the defendant in *Bradshaw*:

> [T]he court in *Bradshaw* found that although the defendant's statement was ambiguous, the totality of the circumstances indicated that the defendant evinced a willingness to discuss the

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[1] In arriving at its decision, the trial court never cited, or discussed, this Court's decision in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), nor did the trial court discuss any of the earlier Illinois Supreme Court decisions following *Bradshaw* and applying the *Bradshaw* analysis to the circumstances presented in this case. *See, e.g., People v. Hicks*, 132 Ill. 2d 488, 548 N.E.2d 1042, *cert. denied*, 495 U.S. 938 (1989); *People v. St. Pierre*, 122 Ill. 2d 95, 522 N.E.2d 61 (1988).

> case. In the present case, Olivera's statement was more vague than the question in *Bradshaw*, there was nothing to indicate that Olivera understood his rights as in *Bradshaw*, Olivera was 16 years old with no prior experience with the police and he surrendered himself to the police in the company of his father and his lawyer.

246 Ill. App. 3d at 936-37, 617 N.E.2d at 109. The appellate court concluded that "given the circumstances surrounding the defendant's statement, 'what happened,' the defendant did not initiate a conversation evincing a desire to have a generalized discussion of the investigation." 246 Ill. App. 3d at 938, 617 N.E.2d at 110.

The Illinois Supreme Court granted the State's petition for leave to appeal from the appellate court's decision and subsequently affirmed the appellate court's reversal of the respondent's conviction. *People v. Olivera*, 164 Ill. 2d 382, 647 N.E.2d 926 (1995). Following the reasoning of the Illinois Appellate Court, the Illinois Supreme Court concluded:

> In the instant case the defendant's question "What happened?" posed to Detective Kato immediately following the conclusion of the lineup cannot be said to evince on the defendant's part a willingness and a desire for a generalized discussion concerning the investigation. To ascribe such significance to this limited question would render virtually any remark by a defendant, no matter how offhand or superficial, susceptible of interpretation as an invitation to discuss his case in depth. To do so would amount to a perversion of the rule fashioned in *Edwards* and articulated more fully in *Bradshaw*.

* * *

> Inasmuch as we hold that the defendant did not initiate the conversation in a manner evincing a willingness and desire for a generalized discussion concerning the investigation, we need not make the further inquiry required by *Bradshaw* to be made after a court has determined that an accused has initiated such a conversation. Therefore, we affirm the judgment of the appellate court insofar as it reverses the circuit court's denial of the defendant's motion to suppress his inculpatory statements.

164 Ill. 2d at 390-92, 647 N.E.2d at 930-31.

REASONS FOR DENYING THE PETITION

The instant Petition fails to present any question that is appropriate for certiorari jurisdiction. To the contrary, this case involves nothing more than a straightforward application of the principles discussed by this Court in *Bradshaw*. Following *Bradshaw*, the Illinois Supreme Court and the Illinois Appellate Court simply held, in conformity with prior cases in the courts of Illinois, that respondent's utterance, "what happened," made shortly after a late night lineup, did not constitute an initiation of a conversation with the police in a manner evincing a willingness and desire for a generalized discussion concerning the investigation. *People v. Olivera*, 164 Ill. 2d 382, 647 N.E.2d 926 (1995); *People v. Olivera*, 246 Ill. App. 3d 921, 617 N.E.2d 98 (1st Dist. 1993).

Supreme Court Rule 10.1 provides that certiorari will be granted by this Court only when there are "special and important reasons therefor," such as the following:

* * *

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

S. Ct. R. 10.1.(b), (c). As discussed below, no such special and important reasons for granting review are presented here.

I. THIS COURT SHOULD DENY THE INSTANT WRIT PETITION BECAUSE THE ISSUE RAISED BY THE STATE HAS NOT BEEN PRESENTED BY THE ILLINOIS SUPREME COURT'S DECISION IN THIS CASE.

Seeking to have this case reviewed by this Court, the petitioner has phrased its "Question Presented for Review" in a manner calculated to maximize its appeal for review. However, the question as phrased slyly ignores the actual holding of the Illinois Supreme Court, and seriously misstates the issue presented to (and decided by) that court. Petitioner frames the question for review by this Court as follows:

> Whether, after a criminal defendant has invoked his right to counsel during custodial interrogation, police must respond to a question from the defendant specifically regarding the investigation by first readministering *Miranda* warnings, since *Miranda* warnings were intended only as a prophylactic measure to balance the coercive atmosphere of custodial interrogation.

(Petition at i)

Although the petitioner may wish to have this Court review and resolve the above-quoted issue, *that* issue has not been presented by the Illinois Supreme Court's decision in this case. To the contrary, the Illinois Supreme Court merely held that, given the circumstances existing here, under *Bradshaw*, Olivera's limited question "what happened?" posed to police following the lineup did not constitute an initiation of a conversation evincing on Olivera's part a willingness and a desire for a generalized discussion concerning the investigation. The Illinois Supreme Court itself therefore framed the issue that it decided in terms far different than the characterization of the issue by the petitioner:

> The issue presented concerning the defendant's motion to suppress is the relatively narrow one of whether, after having invoked his right to the presence of counsel during custodial interrogation the defendant waived that right by initiating a conversation with the police in a manner evincing a willingness and a desire for a generalized discussion about the investigation and by knowingly and intelligently choosing to speak with law enforcement authorities in the absence of counsel.

164 Ill. 2d at 382, 647 N.E.2d at 926.

The issue presented to and decided by the Illinois Supreme Court was analyzed in compliance with the principles of *Bradshaw*. Accordingly, it is only if the petitioner can convince this Court that *Bradshaw* should be reconsidered or modified that this Court should grant the Petition. As discussed below, there is no sound reason presented by the petitioner for such reexamination.

II. PETITIONER PRESENTS NO REASON TO REVIEW SETTLED QUESTIONS OF FEDERAL LAW.

The "question" by the 16-year-old custodial suspect here ("What happened?") was determined by the Illinois Supreme Court to be a "limited question" that did not "evince on the defendant's part a willingness and a desire for a generalized discussion concerning the investigation." 164 Ill. 2d at 390-91, 647 N.E.2d at 930. Applying the straightforward principles first established in *Edwards* and further defined in *Bradshaw* and its Illinois and federal progeny, such a remark "will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983). Accordingly, if, as occurred here, the police respond to such a question in a manner that police should know is reasonably likely to elicit an incriminating response, then the police have improperly initiated questioning or its functional equivalent (*i.e.*, words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect). Police have long been subject to these well-recognized rules, for exactly the reasons conceded by petitioner, namely, to dispel the compulsion inherent in

custodial surroundings, and to prevent the police from badgering a custodial suspect who has invoked his right to counsel by means of continued interrogation or its functional equivalent. This case therefore involves nothing more than a straightforward application of the principles set forth in *Bradshaw*.

Although the Petition suggests that this case presents an important federal question regarding confusion in the courts resulting from this Court's decision in *Bradshaw* (Petition at 7, 13, 14), it is evident that petitioner's genuine complaint is with the law set out in *Bradshaw* itself. Under *Bradshaw*, once a custodial suspect has invoked his right to counsel, no continued police interrogation is proper absent, first, a showing that the defendant initiated a dialogue with the police relating to the investigation and, second, a knowing and intelligent waiver of the right to counsel and the right to silence. *Bradshaw*, 462 U.S. at 1045-46. *Bradshaw* itself makes it clear that these inquiries are necessarily fact-intensive and dependent on the "circumstances surrounding the case, including the background, experience and conduct of the accused." *Id.* Indeed, *Bradshaw* forthrightly states that it would be undesirable for this Court to "build a superstructure of legal refinements around the word 'initiate' in this context." *Id.* at 1045. This Court thereby acknowledged that such fact-intensive inquiries were appropriately left to other courts. It is apparent that the petitioner here seeks only to overturn the factually-dependent ruling of the Illinois Supreme Court that, in the circumstances presented here, Olivera's inquiry was not an initiation of a dialogue about the detective's investigation nor an invitation to further interrogation. 164 Ill. 2d at 390-92, 647

N.E.2d at 930-31. Moreover, even if this petitioner could convince the Court to engage in the fact-intensive examination of whether Olivera's inquiry was a sufficient initiation of dialogue about the Torres murder, the petitioner would further have to overcome the similarly fact-laden analysis by the Illinois Appellate Court that concluded Olivera did not knowingly and intelligently waive his rights to counsel and to silence. 246 Ill. App. 3d at 938, 617 N.E.2d at 110.

Similarly, although petitioner asserts that the members of the Illinois Supreme Court were "confused by the plurality decision in *Bradshaw*" (Petition at 14), the opinion suggests no such confusion, particularly with respect to any important and unsettled federal question. To the contrary, all members of the divided court agreed that the standards governing the instant case were established by *Bradshaw*, and all members of the divided Illinois Court agreed about what those controlling standards were. The only material difference between the two opinions stemmed not from any "confusion" about unsettled questions of federal law, but rather from a mere difference in views between the members about whether, under the particular factual circumstances of this case, respondent initiated a conversation when he asked "What happened?" after a late-night lineup. The five-justice majority found no initiation; the two-justice dissent felt otherwise. Such fact-based differences of opinion, arising from the application of particular facts to settled federal doctrines, fail to raise special and important questions of unsettled federal law that are appropriately reviewed by this Court.[2]

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[2] Even if petitioner were correct in claiming that the plurality opinion in *Bradshaw* has resulted in confusion or uncertainty with

In arriving at its decision, the trial court never cited, or discussed, this Court's decision in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), nor did the trial court discuss any of the earlier Illinois Supreme Court decisions following

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respect to whether a custodial suspect who previously invoked his right to counsel "initiated" a conversation with the authorities, this case would be an inappropriate case to review for purposes of reconsidering or "clarifying" *Bradshaw*. This case does not involve facts or circumstances that would afford the Court a meaningful opportunity to clarify the supposed confusion about which the petitioner complains. To the contrary, this case involved an offhand question by a 16-year-old, inexperienced suspect in isolated police custody that was substantially more ambiguous and limited than that posed by the far more experienced suspect in *Bradshaw*. Furthermore, unlike *Bradshaw*, this case involved an immediate response by police – to this limited, ambiguous and offhand remark – that the police should have known would reasonably likely elicit an incriminating response from Olivera. Under the circumstances of the present case, the proper result under the Fifth Amendment is so clear, regardless of which of the two opinions in *Bradshaw* is followed, that little would be gained – or "clarified" – by a reconsideration of *Bradshaw* under the circumstances presented by this case. Ultimately, as demonstrated by the Petition itself, the case that petitioner really wishes this Court to consider, for purposes of reexamining *Bradshaw*, is one where a custodial suspect who has previously invoked his right to counsel subsequently approaches the police with a question *specifically regarding the investigation*. That case is not this case, nor will a review of this case provide an answer – or at least any better answer than *Bradshaw* has already provided – to that question. The reason is simple: because this case involves a limited question, falling well short of a "question specifically regarding the investigation," the remark at issue in this case would not yet trigger the specific concerns about which there was disagreement in the two *Bradshaw* opinions. Because Olivera's post-lineup remark in this matter fails to constitute an "initiation" under the views expressed in *either* opinion, none of the respects in which petitioner claims that *Bradshaw* is confusing will be clarified by a review of this case.

Bradshaw and applying the appropriate *Bradshaw* analysis to the circumstances presented in this case.

III. THIS COURT SHOULD NOT REVIEW A DECISION THAT DOES NOT DECIDE ANY FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER COURTS.

In its final attempt to obtain review by this Court, the petitioner suggests, relying on decisions from other state courts of last resort and United States Courts of Appeal, that the Illinois Supreme Court decided a federal question in a way that conflicts with the decisions of other courts. (Petition at 10-13) Although petitioner notes that uncertainty persists as to what constitutes an "initiation" (*id.* at 12), conspicuously, the petitioner never straightforwardly contends that the Illinois Supreme Court ever decided a federal question in this case in a way that actually *conflicts* with the decisions of other courts. Indeed, although petitioner discusses how different courts have reached different outcomes on the issue of "initiation" based on the particular facts and circumstances of different cases, petitioner never identifies any other state or federal decision that decides the "initiation" issue in a way that conflicts with the Illinois Supreme Court's decision. To the contrary, all of the cases cited by the petitioner have unhesitatingly applied, with respect to different factual contexts, the same basic *Bradshaw* analysis undertaken by the Illinois Supreme Court in this instance. In sum, although uncertainty may persist as to what actually constitutes an "initiation" in any given case, the uncertainty arises, as in many situations in the law, from the inherently fact-specific nature

of the analysis that must be undertaken to resolve the issue, *not* from unsettled federal questions or conflicting resolutions of such questions. Only where the same facts resulted in different outcomes would a potentially appropriate issue for review be raised. That is not the case presented here, nor does the writ petition ever so contend. Since, at bottom, the writ petition fails to identify any cases deciding a federal question in a way that conflicts with the decisions of other courts, and instead merely presents cases deciding settled questions of federal law consistently in the same way, there are no conflicting decisions to review and therefore no special and important reasons for granting certiorari in this case.

CONCLUSION

For all of the foregoing reasons, the State's Petition for a Writ of Certiorari should be denied.

Dated: July 28, 1995 Respectfully submitted,

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